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No. 99-596

Supreme Court, U.S.
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In The

Supreme Court of the United States

GEORGE MASON UNIVERSITY,

Petitioner,

v.

UNITED STATES OF AMERICA and
ANNETTE GRECO LITMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT ANNETTE GRECO LITMAN IN OPPOSITION

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QUESTION PRESENTED

Whether Congress could constitutionally require the States to waive their Eleventh Amendment immunity under Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.*, when they apply for and voluntarily accept federal funds for education programs or activities, as did Petitioner George Mason University here.

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STATEMENT OF THE CASE

In its decision, reported at 185 F.3d 544, the United States Court of Appeals for the Fourth Circuit held, consistent with other courts of appeals which have dealt with the *same* issue, that Petitioner George Mason University (GMU) knowingly and voluntarily waived its sovereign immunity against suits under Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.*, by applying for and accepting federal education funds. App. 1-26.[1] The Court of Appeals affirmed a decision by the United States District Court for the Eastern District of Virginia, 5 F.Supp. 2d 366, which was issued on May 7, 1998, and which denied in pertinent part GMU's motion to dismiss Respondent Annette Greco Litman's Title IX claims against it. App. 27-55.

A. STATEMENT OF FACTS

The following facts are alleged in Respondent Litman's complaint:

Petitioner GMU is a public institution of the Commonwealth of Virginia. It offers education programs and receives federal financial assistance within the meaning of Title IX, 20 U.S.C. §1681(a). App. 3.

During the 1995-1996 school year, Respondent Annette Litman was a student taking electrical engineering program courses at GMU. During the Summer 1995

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[1] "App." references are to the Appendix to Petitioner's Petition. "J.A." references are to the Joint Appendix to the parties' briefs to the Fourth Circuit.

semester, Ms. Litman took a computer science class taught by Defendant Eugene Norris, an Associate Professor in GMU's Computer Science Department. Before the Fall 1995 semester, Dr. Norris offered Ms. Litman a job as a research assistant on a research project under him, and she accepted it. Dr. Norris also persuaded her to sign up for his Fall 1995 computer science class. App. 2, 3.

Dr. Norris sexually harassed Ms. Litman. He stalked her; he made increasingly intense gestures of love towards her; he inquired repeatedly about her sexual activities with her husband; he subjected her to discourses on sex and love during weekly status report meetings; he telephoned her at home; he invited her to lunch; he touched her intimately on her hands; he gave her personal gifts; and he inappropriately accessed her confidential student records on the GMU computer system. App. 3-4, 28.

Beginning in the fall of 1995, Ms. Litman reported Dr. Norris's unwelcome behavior to other GMU faculty and administrators. Between October 1995 and February 1996, and contrary to petitioner's assertions (Petition at 5), she informed Dr. Geoffrey Orsak, of the Electrical and Computer Engineering (ECE) Department, about Dr. Norris's sexual harassment of her. App. 28. Although Dr. Orsak informed Dr. Gerald Cook, Chair of the ECE Department, about it, no action was taken, and Dr. Norris continued to harass Ms. Litman sexually. J.A. 166-167; 14-17. On January 23, 1996,[2] Ms. Litman terminated her assistantship

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[2] Unless otherwise indicated, all dates hereafter refer to 1996.

with Dr. Norris. In February she reported Dr. Norris's sexual harassment directly to Dr. Cook. Still Dr. Cook took no action against Dr. Norris. J.A. 17.

Dr. Norris's sexual harassment caused Ms. Litman considerable emotional distress. App. 28. Suffering from insomnia, anxiety, and depression, she entered counseling at the GMU student development center. App. 29. She terminated her working relationships with other professors and ceased contact with faculty. App. 4, 28-29; J.A. 15-18.

The following weekend, Dr. Norris stalked Ms. Litman outside one of her classes and told her that he had "[his] ways of finding [her]." Ms. Litman informed Dr. Norris that she had begun counseling and was avoiding contact with faculty. Dr. Norris asked her if "faculty" included him, persisted in trying to talk to her about their relationship, and then followed her when she walked away from him. App. 29; J.A. 17-18.

Later Ms. Litman went to the GMU police department for help, but received none. On February 13, Dr. Norris sent her a Valentine's Day e-mail. App. 28; J.A. 17-18. Ms. Litman complained again to Dr. Cook and demanded he take action. Dr. Cook refused, but did inform her that she should take her sexual harassment complaint to GMU's Equity Office. J.A. 18. On February 15, Ms. Litman complained to GMU's Equity Office about Dr. Norris's sexual harassment. The Equity Office asked Dr. Norris to avoid contact with Ms. Litman, but it refused to process her complaint, in violation of GMU's sexual harassment policy. App. 4, 29; J.A. 18-19.

In early April, Ms. Litman was rejected by professors she approached to advise her senior project. Some faculty would not speak to her. App. 4, 29; J.A. 19-20. On April 12, in Dr. Cook's presence, Ms. Litman asked Dr. Orsak not to spread damaging gossip about her sexual harassment experiences if he were doing so. In response, Dr. Orsak asked Ms. Litman to drop out of his class. Ms. Litman refused. Dr. Orsak informed Ms. Litman that he and Dr. Cook would decide if she would be removed from his class. Five days later, Ms. Litman discovered that Dr. Orsak had complained to the GMU Equity Office that *she* was sexually harassing *him* and that he was attempting to have her removed from her classes. App. 4, 29; J.A. 20-21.

Ms. Litman sent Dr. Orsak and another professor e-mail which protested GMU's retaliation against her for complaining about Dr. Norris's sexual harassment, expressed her increasingly severe emotional distress, and sought reconciliation which would enable her to continue her academic activities. App. 4, 29; J.A. 20-22. The professors did not respond with help for her. Ms. Litman reported the conflict to the GMU President's office, explaining that Dr. Orsak was making false complaints about her and that the Equity Office was not acting on her sexual harassment complaint against Dr. Norris. See App. 29; J.A. 21.

On April 30, because GMU's Equity Office still refused to help her, Ms. Litman began circulating a petition to urge GMU to investigate her sexual harassment complaint against Dr. Norris, and on May 3 she filed a formal complaint with the Equity Office. See App. 29; J.A. 21-22. At the same time, suffering from severe anxiety

attacks and suicidal ideation, Ms. Litman sought emergency room care and was prescribed sedatives, pending a full psychiatric evaluation. See J.A. 24.

Later, although they knew that she was in counseling for emotional distress, Dr. Orsak and another professor brought disciplinary charges against her under the Student Judicial Code. In May, Defendant Girard Mulherin, Associate Dean of Student Services and GMU's Judicial Administrator, charged Ms. Litman with allegedly "disrupting the learning/teaching environment" by harassing Dr. Orsak, predominantly through her e-mail. See App. 4, 29. See App. 29; J.A. 23-24. The disciplinary proceeding was held before the University Judicial Board (UJB) on May 30. App. 4, 29. The hearing was rife with procedural and due process irregularities. J.A. 24. Ms. Litman, who was sedated with Valium, asked for a postponement and an advocate since she was unable to defend herself because of her mental illness and medication for it. However, GMU rejected her request for these accommodations, and required her to defend herself then. App. 29. Although there was no evidence she had actually disrupted the learning or teaching environment, the UJB recommended her expulsion. App. 4, 30; J.A. 24-27. In his capacity as Judicial Administrator, Dr. Mulherin then found Ms. Litman guilty and expelled her permanently, imposed academic sanctions against her, and barred her from all GMU campuses and from speaking to anyone at GMU. App. 4; 30; 26-29.

After Ms. Litman was expelled, GMU's Equity Office finally proceeded with the sexual harassment charges that she had filed against Dr. Norris many months earlier. On October 17, it held a hearing on those charges. App. 4,

30. The evidence against him was overwhelming, and he admitted most of the acts alleged in her complaint. However, GMU merely found that Dr. Norris had failed to live up to its "standards" and that he did not "violate" GMU's sexual harassment policy, and it did not discipline him at all or provide any relief for Respondent Litman. App. 4, 30; J.A. 30.

B. THE PROCEEDINGS BELOW

On October 31, 1997, Respondent Litman filed her Complaint against GMU, Dr. Norris, Dr. Orsak, and Dean Mulherin under Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.*, 42 U.S.C. §1983, and state law. She claimed gender discrimination in violation of Title IX (against GMU) (Count I); retaliation in violation of Title IX (against GMU) (Count II); deprivation of free speech rights under color of law (against Dr. Orsak, Dean Mulherin and GMU) (Count III); deprivation of due process under color of law (against GMU, Dr. Orsak, and Dean Mulherin) (Count IV); deprivation of Equal Protection Rights under color of law (against Dr. Norris, Dr. Orsak, Dean Mulherin, and GMU) (Count V); and intentional infliction of emotional distress (against Dr. Norris) (Count VI). J.A. 168-169; 31-37.

The district court denied motions to dismiss Counts I and II against GMU and Counts V and VI against Dr. Norris. In denying Petitioner GMU's motion to dismiss Respondent Litman's Title IX claims, the district court held that by accepting federal funds after enactment of 42 U.S.C. §2000d-7, GMU consented to the waiver of its Eleventh Amendment immunity (App. 49-50). The Court

of Appeals affirmed on that basis, upholding the constitutionality of Title IX under the Spending Clause of Article I. The appeals court did not reach the issue whether the law was also constitutional under Section 5 of the Fourteenth Amendment (the "Equal Protection Clause"), as Ms. Litman and the United States had argued in the alternative.

ARGUMENT

The Court should not consider the issue presented by petitioner in its petition – whether "Congress may require States to waive its sovereign immunity as a condition of receiving federal funds" (Petition at i) – because petitioner did not present it to the courts below. In any event, it is well settled under the Court's decisions that, in enacting legislation under the Spending Clause of Article I, Congress may constitutionally condition a State's acceptance of federal funds on its waiver of Eleventh Amendment immunity from suits under that particular legislation. The decision of the Court of Appeals below is in accord with those decisions and does not conflict with those of other circuits which have ruled on the constitutionality of Title IX as applied to suits against States.

I. PETITIONER IS FORECLOSED FROM RAISING A NEW ISSUE IN ITS PETITION

Title IX prohibits sex discrimination in federally-funded education. In relevant part, Title IX, 20 U.S.C. §1681(a), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, . . .

Under Title IX, students and school employees may bring a private cause of action for sexual harassment against entities which receive Federal funds for education. *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 288-89 (1998); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 63-65, 76 (1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

In 1986 Congress enacted the Civil Rights Remedies Equalization Act [CRREA], 42 U.S.C. §2000d-7(a)(1), to make it clearer that States would not be immune from suits under statutes such as Title IX. See *Lane v. Peña*, 518 U.S. 187, 200 (1996); 31 Cong. Rec. 22,344-22,345 (1985). The CRREA provides, in relevant part:

> A State shall not be immune from suit under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of * * * title IX of the Education Amendments of 1972 [20 U.S.C. Section 1681 *et seq.*] * * * or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

As the Court explained in *Franklin*, 503 U.S. at 72, "In the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975."

Petitioner attacks Title IX and Ms. Litman's complaint on the ground that Title IX was an unconstitutional abrogation of the Commonwealth's immunity under the Eleventh Amendment, in the view that Congress may not use Article I's Spending Clause to require a State to waive its sovereign immunity against a private party suit as a condition for receiving funds from the Federal Government, because such a requirement is unduly coercive. Petition at 10-12, 15, 23-25.

This is an argument which petitioner did not raise below. Petitioner acknowledges that it "did not use the language of coercion in its briefs before the District Court and Fourth Circuit." Petition at 15 n. 13.[3] As the Fourth Circuit pointed out (App. 16), petitioner did not argue below "that the attachment of conditions to the funding arrangement is coercive." Rather, petitioner argued, more narrowly, simply that for a State to waive its Eleventh Amendment immunity, Congress must specifically impose such a waiver by explicit language in the statute at issue. App. Br. 19-20; see also App. 12, 16-17. Also, in its brief to the Fourth Circuit (App. Br. 6, 7), GMU specifically acknowledged that immunity may be abrogated by Congress under Section 5 of the Fourteenth Amendment and that "a State, by its choice, may waive its Eleventh Amendment immunity." Because petitioner did not present this contention to the Fourth Circuit, the Court should reject the petition for this reason alone. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989); *E.E.O.C. v.*

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[3] Contrary to petitioner (Petition at 15 n. 13), this is not merely "different rhetoric," but is an entirely separate and broader argument.

Federal Labor Relations Authority, 476 U.S. 19, 24 (1986). Accordingly, this should end the Court's review of GMU's petition.

Petitioner argues that it should be permitted to raise this issue because "arguments regarding sovereign immunity can be raised at any stage of the proceeding." Petition at 15 n. 13, citing *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 467 (1945). However, that case is distinguishable because its central issue was not whether a federal statute abrogated sovereign immunity, but whether a federal court had jurisdiction over an action by private parties against a State and state officials, where the State had initially defended the suit on the merits (and prevailed) and had thus waived sovereign immunity by such a defense.[4] In *Ford*, the petitioner argued for the first time in this Court that the Eleventh Amendment sets forth an explicit limitation on federal judicial power which required the issue before the Court first be decided by the state courts. The case required an initial interpretation of state law – specifically whether state executive or administrative officials could consent to suit against the state. *Id.* at 467-470. The Court held that by its actions in that case, the state official had not waived sovereign immunity by defending the merits in a particular case and that a waiver required a "general consent to suit in all similar causes of action." *Id.* at 468. Moreover, here the petitioner *did* raise the general issue in its pleadings and brief below, but affirmatively chose not to make the broad contention it now presents to the

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[4] An Indiana statute provided that such action could be brought in state court against the state. *Id.* at 465-466.

Court. Therefore, it has already had, and squandered, the opportunity to present that argument.

II. THE FOURTH CIRCUIT'S DECISION IS CORRECT

If the Court reaches the "merits" of petitioner's arguments, it should reject them. Thus, it is frivolous for petitioner to argue that it is unconstitutional for the Federal Government to require a waiver of immunity as a condition of participation in federally funded programs (Petition at 18-19). It has long been established, and the Court recently reaffirmed, that Congress may constitutionally condition States' participation in federally funded programs upon a waiver of their immunity from suits by private parties. See *College Savings Bank v. Florida Prepaid Postsecondary Education Expenses Bd.*, 119 S. Ct. 2219, 2223, 2231 (1999); *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999); *New York v. United States*, 505 U.S. 144, 171-73 (1992); *South Dakota v. Dole*, 483 U.S. 203, 210 (1987); *Edelman v. Jordan*, 415 U.S. 657, 672 (1974). See also *Gebser*, 524 U.S. at 288, 2267, 118 S. Ct. at 1996, 1999, where the Court referred to "Congress' abrogation of the States' Eleventh Amendment immunity under Title IX, see 42 U.S.C. §2000d-7," without expressing any reservation about whether the abrogation was constitutional. Similarly, in *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1669-20 (1999), the Court seemed to assume that under its Spending Clause powers, Congress could provide for private causes of actions for damages against States receiving federal funds, at least where there was notice to the recipients that they could be liable for the conduct at issue in such suits. Accordingly, if the Court

does not reject the petition because petitioner failed to present this issue below, it should deny the petition because the law is clear that, by accepting federal funds, GMU waived any immunity from a Title IX suit, as the District Court and Circuit Court properly held (App. 21, 26, 49-50).

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court established a two-prong test for determining whether a federal statute has constitutionally abrogated the States' Eleventh Amendment immunity: "[F]irst whether Congress has unequivocally expresse[d] its intent to abrogate the immunity'; . . . and, second, whether Congress has acted 'pursuant to a valid exercise of power.' " *Id.* at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). It is settled that "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). When these principles are applied here, as the courts below did properly, petitioner's arguments should be rejected.

First, as Respondent has admitted (App. Br. 8; see also App. 16-17), the Court has held that in Section 2000d-7, Congress unambiguously expressed its intent to remove States' Eleventh Amendment immunity from private suits in federal court. *Lane v. Peña*, 518 U.S. at 198; *Franklin*, 503 U.S. at 72. The waiver condition does not unduly restrict such States' immunity under the Eleventh Amendment, since they may choose to accept the condition imposed by the statute or forego the federal funds authorized by that legislation. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 238; *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923). Cf. also *Alden v. Maine*, 119 S. Ct. 220,

2246, 2254, 2261, 2263, 2264, 2266, 2267, 2268 (1999), where the Court, through its repeated references to "non-consenting States," took pains to distinguish the statute there (the Fair Labor Standards Act) from other statutes, such as Title IX here, in which Congress has reasonably conditioned a State's acceptance of federal funds on its waiver of its sovereign immunity against private causes of action in federal court to enforce such statutes. As the Court held in *Massachusetts v. Mellon*, 262 U.S. at 480, "[T]he powers of the state are not invaded since the statute imposes no obligation [to accept the funds] but simply extends an option which the state is free to accept or reject." Under *Dole*, 483 U.S. at 207, such waivers of immunity are deemed valid when Congress has exercised its power in pursuit of "the general welfare"; when it has clearly and unambiguously expressed its desire to condition acceptance of the funds on compliance with the statute; and when the condition is related to a federal interest in a particular project or program.

Here, all of those conditions are readily met. First, as the Court held in *Gebser*, "Congress enacted Title IX in 1972 with two principal objectives in mind: 'to avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices.' " 524 U.S. at 289, citing *Cannon*, at 704.[5] Petitioner does not deny that by prohibiting

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[5] The text in *Cannon* to which the Court in *Gebser* referred was the following statement (441 U.S. at 704): "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."

sex discrimination in federally funded educational programs, Title IX clearly provides for the "general welfare." See App. 16, 46.

Second, Title IX obviously conditions the receipt of Federal financial assistance by any education program, including State programs, on its compliance with the statute's prohibition against sex discrimination. See also App. Br. 19. In *Lane*, 518 U.S. at 198, the Court held the abrogation was unambiguous. See also *Clark v. California*, 123 F.3d 1267, 1270 (9th Cir. 1997), *cert. denied sub nom. Wilson v. Armstrong*, 524 U.S. 937 (1998).

Third, the condition is directly related to the federal interest in prohibiting sex discrimination in educational programs receiving federal funds. It has long been held that the Fourteenth Amendment proscribes gender discrimination, including such discrimination in public education. See *United States v. Virginia*, 518 U.S. 534 (1996); *Cannon*, 441 U.S. at 708 ("Since the Civil War, the Federal Government and the federal courts have been ' "the primary and powerful reliances" ' in protecting citizens" "against invidious discrimination of any sort, including that on the basis of sex."); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). To that end, "Title IX focuses . . . on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Gebser*, 118 S. Ct. at 1997, citing *Cannon, supra*, at 704. As the Eighth Circuit held in *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997),

> Because the Supreme Court has repeatedly held that those substantive provisions [of the Fourteenth Amendment] proscribe gender discrimination in education, see, *e.g.*, *United States v.*

> *Virginia*, [518] U.S. [534], 116 S. Ct. 2264, 135 L.Ed. 2d 735 (1996), we are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by §5.

In the instant case, it is undisputed that at all relevant times, since well before Ms. Litman's claims arose, petitioner has received federal funds and "thus, is subject to Title IX." App. Br. 4. Under the authorities cited above (pp. 12-14), since GMU accepted federal funds after Section 2000d-7(a)(1) became effective, it waived any Eleventh Amendment immunity against federal suits over alleged Title IX violations. As the Court explained in *Gebser*, by "conditioning an offer of federal funding on a promise by the recipient not to discriminate," Title IX, like Title VI, "amounts essentially to a contract between the Government and the recipient of funds." 524 U.S. at 290, 118 S. Ct. at 1997, citing *Guardian Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 599 (1983). See also *Davis*, 119 S. Ct. at 1669-20; *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

In sum, the appellate court properly held (App. 21) that "Congress, in enacting 42 U.S.C. §2000d-7(a)(1), permissibly conditioned GMU's receipt of Title IX funds on an unambiguous waiver of GMU's Eleventh Amendment immunity, and that, in accepting such funding, GMU has consented to litigate Litman's suit in federal court."

Petitioner asks the Court "to determine whether Congress may use the Spending Clause 'to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy

in the most sensitive area of traditional state concern, areas which otherwise would lie outside its reach.' " Petition at 4, quoting *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1677 (1999) (Kennedy, J., joined by Rehnquist, C.J., Scalia, and Thomas, JJ., dissenting). However, as explained above, the Court has long held that Congress may enact legislation which abrogates, or requires waiver of, the States' sovereign immunity under either the Spending Clause or the Equal Protection Clause. To the extent that petitioner's request suggests that the above-quoted dissenting opinion challenged the application of Title IX to the States under the Spending Clause, petitioner of course misrepresents that opinion. Petitioner quotes it out of context, by not including the phrase by Justice Kennedy which immediately preceded it: Congressional Spending Clause power, "*if* wielded without concern for the federal balance, has the *potential* to obliterate distinctions. . . . " 119 S. Ct. at 1677 (emphasis added). Further, the focus of the *Davis* dissent was on the issue of how much notice needs to be provided to States about the conditions attached to the federal funds, and specifically whether States are on notice that, through Title IX, Congress wanted to prohibit sexual harassment not only by teachers on students, but also by students towards other students. In addition, petitioner fails to mention that the dissenters in *Davis* acknowledged that "[t]eacher sexual harassment of students" would be an action by an agent of the State which it would know was prohibited by Title IX. *Id.* at 1679. The Title IX claims here of course concern the classic teacher-on-student sexual harassment, which the *Davis* dissenters would hold was

reasonably foreseeable to a State as giving rise to a Title IX action.

Moreover, it is absurd to suggest there is some special "traditional state concern" *in favor of* gender discrimination by state educational institutions! As the Court pointed out in *United States v. Virginia*, 518 U.S. at 531, "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." Petitioner does not begin to demonstrate why there is a constitutional basis for finding that Virginia should have a policy permitting sexual harassment of students by college faculty.

Petitioner argues that it is coercive for Congress to require a State to "waive its sovereign immunity for all claims arising under Title IX if it receives *any* federal funding, even federal funding unrelated to the State's obligations to comply with Title IX." Petition at 15. The argument is frivolous. States should already know that, under the Constitution and Title IX, they must not discriminate on the basis of gender in their educational activities. Moreover, States do not have to apply for federal funds, and when they do, they understand that Title IX conditions receipt on their agreeing not to discriminate on the basis of gender and their waiving sovereign immunity against suits in federal court by private parties. As the Fourth Circuit aptly explained below (App. 17):

> GMU acknowledges that it voluntarily accepts Title IX funding. Indeed, it must apply for federal funds. And in connection with any application, it must assure the Federal Government of its intent to comply with 20 U.S.C. §1681(a). Implementing regulations provide that

> each recipient of Title IX funding must enter into a contract of assurance with the Department of Education and thereby manifest its intent to adhere to the conditions imposed by Title IX. *See* 34 C.F.R. §106.4(a). . . . Thus, in voluntarily accepting federal education funds, GMU is unequivocally put on notice of three conditions: (1) that it may not discriminate in its programs on the basis of sex, *see* 20 U.S.C. §1681(a); (2) that if it does discriminate on the basis of sex, it may be sued by a private individual, *see Gebser*, 118 S. Ct. at 1996, 1999; and (3) that in any such suit, it may not assert its Eleventh Amendment immunity, *see* 42 U.S.C. §2000d-7(a)(1). There can be no doubt that GMU is able "to ascertain what is expected of it" in return for federal education funds.

The above-quoted Education Department regulations, 34 C.F.R. §106.4(a), provide:

> Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

By its terms, the implementing regulations thus apply to any "education program or activity" for which the applicant or recipient receives federal funds. Accordingly, and contrary to petitioner, the statutory and regulatory restrictions of Title IX cover just the education program or activity for which the Federal Government has provided funds and it is not so broad as to cover *all* activities

for which the State receives federal funding. See *Gebser*, 524 U.S. at 289. Therefore, Title IX provides for the free formation of a contract whereby the recipient, whether it is a private entity or a State, promises not to discriminate in educational activities on the basis of gender, in return for the receipt of federal funds for education programs. This is hardly coercive!

Petitioner urges the Court to roll back the calendar three score years, to overrule its decisions in *Dole* and many other cases, and to "return to the general principles of [*United States v. Butler*, 297 U.S. 1 (1936)]." Petition at 17 n. 14. See also Petition at 17-20. In *Seminole Tribe*, the Court reaffirmed the basic principles underlying the abrogation of sovereign immunity, for it held, "[W]e recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the constitution." 517 U.S. at 59, citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976). More recently, in the trilogy of sovereign immunity cases decided on June 23, 1999 – *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999); *College Savings Bank*; and *Alden*, the Court had the opportunity to adopt this anti-federalist approach, but chose instead to affirm that Congress may constitutionally abrogate States' sovereign immunity by requiring them, as a condition for voluntary receipt of federal funds, to consent in advance to waiving their immunity from suits by private individuals in federal courts. See *College Savings Bank*, 119 S. Ct. at 2226, 2231; *Alden*, 119 S. Ct. at 2267; *Florida Prepaid Postsecondary Educ. Bd.*, 119 S. Ct. at 2205.

Without any constitutional or statutory authority, petitioner compares the condition of requiring States to waive their sovereign immunity from private suits as a condition for receipt of federal funds to "a requirement that an individual surrender a vital organ, such as a kidney, as a condition of receiving some public benefit." Petition at 20 n. 15. The comparison is ludicrous! Neither Congress nor the Education Department requires any sacrifice of anything equivalent to "vital organs" by States in return for federal funds. The States have the choice of applying for the funds, and do not have to do so if they do not want the funds. If they do receive such funds, the States must merely consent to waiver of sovereign immunity from private causes of action in federal court, where the plaintiffs must of course prove their claims as a matter of law and fact.

III. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEALS

Furthermore, contrary to petitioner, there is no conflict in the circuits. The other courts of appeals which have ruled on the issue have also upheld the constitutionality of Title IX as applied to State educational programs, under Section 5 of the Fourteenth Amendment. See *Franks v. Kentucky School for the Deaf*, 142 F.3d 360, 362-63 (6th Cir. 1998); *Doe v. University of Illinois*, 138 F.3d 653, 663-667 (7th Cir. 1998), *vacated and remanded on other grounds*, 119 S. Ct. 2016 (1999), *on remand*, 1999 U.S. App. LEXIS 28406 (Oct. 29, 1999) (affirming decision to reject

State's claim of Eleventh Amendment immunity); No. 98-126; *Crawford*, 109 F.3d at 1283.[6]

Petitioner cites *Bradley v. Arkansas Dept. of Education*, 189 F.3d 745 (8th Cir., 1999), for the proposition that "the Eighth Circuit held that §2000d-7 is *unconstitutional* to the extent that it requires a State to waive its sovereign immunity as a condition of receiving federal funds" (Petition at 10; emphasis by petitioner). However, *Bradley* did not involve Title IX, but rather the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1487, and Section 504 of the Rehabilitation Act [RA], 29 U.S.C. §794. In *Bradley*, the court held that Section 504 of the RA fails the second prong of the test in *Seminole Tribe*, 517 U.S. at 55, since it is so broad that it "mandates" that a State "waive its Eleventh Amendment immunity to all claims arising under §504 if it receives any federal funding, even funding unrelated to the state's obligations to comply with §504 or the rest of the RA." 189 F.3d at 757. Therefore, the Eighth Circuit concluded, "Congress's imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion." *Id.*

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[6] Dismissing similar sovereign immunity challenges, the courts of appeals have upheld the constitutionality of other civil rights statutes. See, *e.g.*, *Sandoval v. Hagan*, 1999 U.S. App. LEXIS 30722, *18-28 (11th Cir. 1999) (Title VI); *Lesage v. Texas*, 158 F.3d 213 (5th Cir. 1998) (same), *cert. granted, reversed, and remanded on other grounds*, 1999 U.S. LEXIS 8014 (Nov. 29, 1999); *Varner v. Illinois State University*, 150 F.3d 706, 709-17 (7th Cir., 1998) (Equal Pay Act); *Timmer v. Michigan Dept. of Commerce*, 104 F.3d 833, 838-39 (6th Cir. 1997) (same); *Clark v. California*, 123 F.3d at 1270 (ADA and Section 504 of the Rehabilitation Act).

By contrast, as explained above, Title IX simply and more narrowly prohibits sex discrimination "under any education program or activity receiving Federal financial assistance. . . . " 20 U.S.C. §1681(a). Title IX is thus distinguishable from statutes, such as Title VII and the RA, "which [are] framed in terms not of a condition but of an outright prohibition," and "whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Gebser*, 118 S. Ct. at 1997, citing *Cannon, supra*, at 704. Further, Title IX is much more akin to the IDEA, which the court of appeals in *Bradley did* uphold as constitutional with respect to State programs. Like the Title IX waiver, States knowingly "waive their Eleventh Amendment immunity with respect to IDEA claims when [they] chose to participate in the federal spending program created by the IDEA." 189 F.3d at 753. As the Eighth Circuit explained,

> When it enacted §§1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition a state's participation in the IDEA program and its receipt of federal IDEA funds on the state's waiver of its immunity from suit in federal court on claims made under the IDEA. *Id.*

Finally, the fact that *Bradley* has no adverse impact on Title IX suits against States is reinforced by the fact that in it, the Eighth Circuit did not feel obliged even to mention, let alone distinguish, its decision in *Crawford*, in which it held that Congress constitutionally abrogated

the States' Eleventh Amendment of immunity from Title IX claims. See above.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[7] Furthermore, it is possible that the Eighth Circuit may reverse its own decision since on October 14, 1999, the United States petitioned it for rehearing and rehearing en banc.